In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1614

VICTOR R. WOLDER AND MARJORIE WOLDER,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Pursuant to an agreement entered into in 1947, petitioner, a lawyer, agreed to render such legal services for Marguerite K. Boyce as she might personally require during her lifetime and not to bill her for such services. In turn, Mrs. Boyce agreed to bequeath to petitioner certain shares of stock (Pet. App. 4a). Both the Tax Court (Pet. App. 14a-31a) and the court of appeals (Pet. App. 1a-12a) held that the fair market value of the shares and an amount of cash[1] bequeathed to petitioner

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[1]The cash bequest was made because the shares originally specified in the will were exchanged for common and convertible preferred shares of another corporation as a result of a merger. The convertible preferred shares were redeemed for $15,845, the amount of the cash bequest (Pet. App. 4a).

were includible in petitioner's gross income under Section 61(a) of the Code, and were not exempt as a bequest under Section. 102.[2]

Petitioner renews the argument (Pet. 10-13), rejected by both courts below, that his receipt of stock and cash from the estate of Marguerite K. Boyce was a tax-free "bequest" under Section 102(a) of the Code. He asserts that the decision below conflicts with *United States* v. *Merriam,* 263 U.S. 179, and *Lyeth* v. *Hoey,* 305 U.S. 188.

Section 61(a) of the Code defines gross income as "all income from whatever source derived." The provision specifically includes "[c]ompensation for services" within the definition. Section 61(a)(1). One narrow statutory exception to this broad statutory rule of inclusion is property acquired by gift or bequest. Section 102(a). But the teachings of this Court make clear that whether an item is a gift or bequest for federal income tax purposes depends upon whether the bequest represents a *bona fide* gift or whether it is merely a method for paying compensation. *Commissioner* v. *Duberstein,* 363 U.S. 278; *Hort* v. *Commissioner,* 313 U.S. 28, 31; *Cotnam* v. *Commissioner,* 263 F. 2d 119 (C.A. 5). As the Court has noted, a gift in the statutory sense proceeds from a "detached and disinterested generosity" (*Commissioner* v. *LoBue,* 351 U.S. 243, 246) and "out of affection, respect, admiration,

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[2]Although Mrs. Boyce died in 1965, petitioner did not actually receive the stock and cash until the following year. The Tax Court held that petitioner constructively received the stock and cash in 1965, a year which was not before it (Pet. App. 28a). The court of appeals reversed on this point, concluding that the proper year for inclusion of the stock and cash in petitioner's gross income was 1966. It accordingly remanded the case to the Tax Court for a determination of the exact date upon which petitioner received the stock so that its value could be ascertained as of that date (Pet. App. 11a, n. 5).

charity or like impulses" (*Robertson* v. *United States,* 343 U.S. 711, 714). Since the resolution of these questions depends upon the donor's intent, the Court reaffirmed in *Duberstein* that the distinction between gift and compensation is essentially factual so that the findings of the trier of fact must stand unless clearly erroneous (363 U.S. at 289-291).

Here, it is undisputed that the stock and cash transferred to petitioner were in return for legal services rendered. Based on this evidence, the courts below correctly held that this testamentary transfer was taxable compensation to petitioner for services under Section 61 and not a tax-free bequest under Section 102(a). *Cotnam* v. *Commissioner, supra; Mariani* v. *Commissioner,* 54 T.C. 135; *Cohen* v. *United States,* 241 F. Supp. 740 (E.D. Mich.).

Contrary to petitioner's contention (Pet. 11), the fact that the transfer might be characterized as a bequest under New York law is not controlling for federal income tax purposes. This Court has indicated that the term "gift" in Section 102(a) and its predecessor provisions is a word of art unrelated to state law considerations. Thus, for example, a voluntarily executed transfer of property by one to another, without any consideration or compensation therefor, is not necessarily a "gift" within the meaning of the income tax statute, even though it may be a common law gift. See *Old Colony Trust Co.* v. *Commissioner,* 279 U.S. 716, 730. See also *United States* v. *Mitchell,* 403 U.S. 190, 197; *Commissioner* v. *Duberstein, supra,* 363 U.S. at 285; *Morgan* v. *Commissioner,* 309 U.S. 78, 80-81.

Petitioner's reliance (Pet. 10) upon *United States* v. *Merriam,* 263 U.S. 179, is misplaced. There, the testator made cash bequests to persons named in his will as

executors in lieu of compensation they would have otherwise been entitled to under state law. The Court held that these legacies were tax-exempt bequests under the predecessor of Section 102(a) because they were not given for services to be performed by the executors, but rather for simply meeting the qualifications for status as an executor. Thus, as the court of appeals stated, whatever remaining vitality the *Merriam* holding may have in the light of *Duberstein* (see Pet. App. 6a-7a, n. 4), the testamentary transfers made to petitioner were founded upon a promise for payment for services rendered by petitioner and not for simply satisfying the qualifications as an executor.[3]

Finally, petitioner asserts (Pet. 13-14) a conflict between the decision below and the basis rules of Section 1014. He urges that he is entitled to capital gains treatment upon the increase in value of the stock between Mrs. Boyce's death in 1965 and his receipt of it in 1966. The rule of Section 1014, providing that the basis of property in the hands of a person acquiring it from a decendent is its fair market value as of the decedent's death, applies to "[p]roperty acquired by bequest, devise, or inheritance * * *." Section 1014(b)(1). But without the requisite "sale or exchange" of a capital asset (see Section 1222), petitioner is not entitled to capital gains treatment on any portion of the value of the stock.

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[3] *Lyeth* v. *Hoey*, 305 U.S. 188, cited by petitioner (Pet. 12) as conflicting with the decision below, is also inapposite. There, the Court held that property received by an heir under an agreement settling a will contest is a non-taxable bequest. Nor does *Jacobs* v. *Commissioner*, 34 F. 2d 233 (C.A. 8), certiorari denied, 280 U.S. 603 (Pet. 13), conflict with this decision. That case held only that the payment of a claim by a widow who elects against the will is not a deductible "claim" against the estate for estate tax purposes.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.[4]

ROBERT H. BORK,
Solicitor General.

JUNE 1974.

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[4]Because both courts below held that the value of the stock and cash were income to petitioner, they held in *Estate of Boyce* v. *Commissioner*, P.H. Memo T.C., par. 72,204, that the estate was entitled to an estate tax deduction for these items as a claim against the estate under Section 2053(a)(3) (Pet. App. 32a-36a, 4a, n. 2, 11a). The Commissioner has filed a petition for a writ of certiorari in that case (No. 73-1752), requesting that certiorari be granted only if the Court grants the petition in this case. The Commissioner filed a petition in the *Estate of Boyce* case only to preserve his alternative position, taken to protect the revenue, that in the event the cash and stock are deemed to be a tax-free bequest, the estate is not entitled to a deduction for a claim.